STATE OF MICHIGAN

COURT OF APPEALS

ALVIN B. BOYKIN and WANDA E. BOYKIN,

Plaintiffs/CounterDefendants-Appellants,

v

LPP MORTGAGE, LTD., f/k/a LOAN PARTICIPANT PARTNERS, LTD.,

Defendant/CounterPlaintiff-Appellee.

UNPUBLISHED
August 9, 2005

No. 252925
Wayne Circuit Court
LC No. 02-229539-CH

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Plaintiffs/counterdefendants (plaintiffs) appeal as of right from an order granting summary disposition in favor of defendant/counterplaintiff (defendant). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In 1981, plaintiff[1] secured a loan from the United States Small Business Administration (SBA) for mortgages on two pieces of real property in Detroit, one on Ashton, and one on Grand River. Plaintiff emerged from subsequent bankruptcy proceedings without personal liability for the loan, but the SBA retained its mortgage liens on the properties.

In 1996, a loan officer with the SBA wrote to plaintiff, stating, "SBA would consider discharging its mortgages for consideration. Should you wish to make a lump sum offer as consideration for SBA to discharge its mortgages, please forward your offer to my attention." Plaintiff replied and offered $17,000 for that purpose, detailing that the Ashton property had been sold, pending closing, and that the proceeds could both provide that sum to the SBA and cover certain maintenance costs on the Grand River property. The closing statement for the Ashton property lists a payoff to the SBA of $17,000. The SBA accepted proceeds from that sale[2] and released the lien on the Ashton property. According to plaintiffs, release of the lien on

[1] For convenience, references to a singular "plaintiff" in this opinion will refer to Alvin Boykin.

[2] There are indications that the SBA in fact accepted just $15,000 from that sale, but what is (continued…)

the Grand River property was a matter of lesser urgency because there was no sale in progress. Plaintiff testified at his deposition that an agent of the SBA assured him that the release of the lien on the Grand River property was in progress. However, no such release ever took place.

What is apparently an internal memorandum from the SBA includes a loan officer's comments acknowledging that plaintiff offered $17,000 for release of both liens, but recommending that the agency "release the property on Ashton only . . . and hold the property on Grand River as collateral." The chief of the portfolio management division approved the recommendation, and wrote, as best we can decipher defendant's exhibit, "The $17,000 net proceeds as consideration to discharge our mortgage on the Ashton property only . . . . The repairs to the Grand River property will enhance its value and we hold first mortgage to that property and it is not a part of this action."

Defendant purchased multiple mortgages from the SBA, including the lien on the Grand River property. Defendant then began foreclosure proceedings on the Grand River property. Plaintiffs commenced an action to quiet title, and defendant counterclaimed for foreclosure. The trial court concluded that plaintiff failed to show that he had tendered payment to the SBA with an "explicit and clear condition" of satisfaction of both mortgages, dismissed plaintiffs' claim, and ordered foreclosure of the subject property.

Plaintiffs argue that the trial court erred in interpreting the evidence to indicate that defendant was entitled to judgment as a matter of law. We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Antrim Co Treasurer v Dep't of Treasury*, 263 Mich App 474, 478; 688 NW2d 840 (2004). In order to effect an accord and satisfaction, "the tender must be accompanied by an explicit and clear condition indicating that, if the payment is accepted, it is accepted in discharge of the whole claim." *In re MCI Telecommunications Complaint*, 255 Mich App 361, 367; 661 NW2d 611 (2003). A person accepting a payment without agreeing that it constitutes an accord, but who retains the funds knowing that they were tendered with that condition, has accepted the accord. See *Faith Reformed Church of Traverse City, Michigan v Thompson*, 248 Mich App 487, 494; 639 NW2d 831 (2001). "'[T]here can be no severance of the condition from acceptance and it avails the creditor nothing to protest and notify the debtor that the amount tendered is credited on the claims and not accepted in full satisfaction.'" *Id.*, quoting *Shaw v United Motors Products Co*, 239 Mich 194, 196; 214 NW 100 (1927).

Plaintiff plainly offered proceeds from the sale of the Ashton property to retire both mortgage obligations, and the SBA was aware that such an offer had been made. The letters between plaintiff and the SBA reflected negotiations, and the SBA accepted plaintiff's lump sum payment offer when it accepted proceeds from the sale of the Ashton property. Furthermore, the SBA agent who initially expressed interest in obtaining a lump sum to satisfy both liens testified that he did not remember making any counteroffer to plaintiff, and that his computer log did not reflect any communication with plaintiff after receiving plaintiff's offer of a lump sum in exchange for discharge of the liens on both properties.

(…continued)

important for present purposes is that SBA accepted proceeds from that transaction, not whether it received as much as it originally hoped.

A genuine question of material fact exists concerning whether the SBA accepted or retained proceeds of the sale of the Ashton property with knowledge that plaintiff offered them on the condition that the Grand River lien would be discharged along with the Ashton lien. For these reasons, we reverse the dismissal of plaintiff's claim and judgment for defendant on its counterclaim, and we remand for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray